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88-132

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAYMOND O'NEILL SCOTT and SCOTT FARMS, INC.,
Petitioners,

vs.

RICHARD DEMENNA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS TO BE PRESENTED FOR REVIEW

1. Whether a grant of immunity from suit to a federal official as a matter of law is proper under *Westfall v. Erwin*, ___ U.S. ___; 108 S.Ct. 580; 98 L.Ed. 2d 619 (1988) where an issue of material fact exists as to whether the official was acting within the scope of his authority.

2. Whether the Eleventh Circuit Court of Appeals properly overruled the District Court's finding that there was a genuine issue of material fact as to whether Respondent was acting within the scope of his employment so as to confer immunity as a matter of law upon the Respondent under the rationale of *Westfall v. Erwin*, ___ U.S. ___; 108 S.Ct. 580; 98 L.Ed. 2d 619 (1988)

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this proceeding.

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OPINIONS

The United States District Court for the Middle District of Georgia, No. CA85-47-THOM, denied Respondent's Motion for Summary Judgment on May 8, 1987. A copy of the District Court Order is contained in the Appendix. The Respondent appealed the District Court's ruling to the United States Court of Appeals for the Eleventh Circuit which reversed the opinion of the District Court in an Opinion dated March 14, 1988. *Raymond O'Neill Scott and Scott Farms, Inc. vs. Richard DeMenna*, Slip Op. No. 87-8405 (March 14, 1988). A copy of the Opinion of the Eleventh Circuit is contained in the Appendix.

The Petitioners subsequently filed a Petition for Rehearing before the Panel and/or Rehearing *En Banc* which was denied by Order of the Court of Appeals for the Eleventh Circuit dated April 22, 1988. A copy of the Order denying the Petition for Rehearing is contained in the Appendix.

JURISDICTION

The Supreme Court's jurisdiction is invoked under 28 U.S.C. Section 1254. The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was made and entered on March 14, 1988. The Petitioners' Petition for Rehearing and/or Suggestion for Rehearing *En Banc* was denied by Order of Court dated April 22, 1988.

STATUTES INVOLVED

"The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has, in large part, been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session." *Barr v. Matteo*, 360 U.S. 564; 3 L.Ed. 22 1434; 79 S.Ct. 1335 (1959). Accordingly, there appear to be no statutes directly on point.

STATEMENT OF THE CASE

Petitioners, Raymond O'Neill Scott (hereinafter "Scott") and Scott Farms, Inc. (hereinafter "Scott Farms"), operated a farm and produce-packing business in Newington, Georgia, under the name Scott Farms (R1-7-2). During 1985, Petitioners were engaged in the production and sale of Vidalia onions

from their Newington packing facility (R1-22-20). On May 17, 1985, the Georgia Bureau of Investigation ("GBI") conducted a raid on Petitioners' produce facility in Newington based upon allegations of Petitioners' mislabeling of Vidalia onions (R1-7-2). On May 20, 1985, Respondent DeMenna, officer in charge of the Thomasville, Georgia office of the Federal-State Market News, prepared and broadcasted over the Market News wire service, a defamatory teletype news release concerning the criminal investigation involving the Petitioners. (R1-32-Exhibit "A"). Petitioners herein subsequently filed suit against DeMenna for damages suffered as a result of the defamatory news release. DeMenna filed a Motion for Summary Judgment claiming that he, as a federal employee allegedly acting within the scope of his employment, was entitled to immunity from common law tort liability.

DeMenna admitted in his deposition that he had never filed a previous report of an ongoing criminal investigation or raid of a farm in his capacity as a Federal Market News Reporter. (R1-22, 35-36). DeMenna also admitted that he never attempted to confirm the statements contained in the news release involved herein with Petitioner Scott or his agent, Dennis Seal (R1-22, 42), or with the GBI or any other law enforcement agency (R1-22, 42) prior to broadcasting the allegations over the wire. Moreover, Respondent DeMenna admitted that the information provided to him concerning the GBI raid on Petitioner Scott's packing shed was provided to him by individuals who were not his regular contacts in the Vidalia onion market (R1-22, 35).

DeMenna has attempted to defend his reporting of the GBI raid on Petitioner Scott's premises by stating that he was required to report "unusual occurrences," and was therefore acting within the scope of his employment. He stated that the requirement to report unusual occurrences is contained in the "Market News Handbook" and in various branch notices received periodically from Washington by the Market News reporters. Despite DeMenna's claims, the "Market News Handbook" does not contain any suggestion or requirement that alleged criminal charges involving farmers or police raids on farms be reported by the Market News reporting service. (R1-32-Exhibit "B").

In Part 5 of *Contents of Market News Reports*, the guidelines for contents of reports are outlined. Number 6 thereunder provides that some non-market news information may be reported so long as "it does not displace regular market news information and has been cleared by the Branch Chief." (R1-32-Exhibit "B"). DeMenna admitted that he made the press release here involved without clearing it with his Washington superiors. (R1-22).

The trial court, in denying Respondent DeMenna's Motion For Protective Order, stated that, "It seems obvious that the question of whether his actions were in the scope of his employment presents a fact issue . . ." (R1-17). The trial court subsequently denied DeMenna's Motion for Summary Judgment. (R1-35).

The issue of whether the Respondent's actions were within the scope of his employment is dependent upon: (a) whether a police raid on a farmer is an "unusual occurrence" as that term is used in the Handbook which defines the Respondent's job responsibilities; and (b) assuming for the sake of argument that a

police raid on a farmer is an "unusual occurrence," whether the reporting of unverified and untrue criminal accusations in addition to reporting the fact of a raid is an action within the scope of Respondent's authority. These questions involve questions of fact for determination by jury.

BASIS FOR FEDERAL JURISDICTION BELOW

The District Court for the Middle District of Georgia had jurisdiction of this case on removal pursuant to 28 U.S.C. Section 1442.

ARGUMENT

The opinion of the Eleventh Circuit reversing the District Court's denial of Respondents' Motion for Summary Judgment is based on the recent decision of the United States Supreme Court in *Westfall v. Erwin*, ___ U.S. ___ , 108 S. Court, 580, 98 L.Ed.2d. 619 (1988). The Eleventh Circuit opinion discusses in detail the requirement under *Westfall v. Erwin* that a government official have been engaged in discretionary duties in order to be entitled to immunity. The Court concludes that the Respondent herein, DeMenna, was engaged in discretionary duties. The Court then goes on, without setting forth any basis for doing so, to state at the very conclusion of its opinion that "because no genuine issue of fact remained as to whether DeMenna acted within the scope of employment, summary judgment on the immunity issue should have been granted." The opinion of the Court below thus ignores this Court's test for determining whether an official is entitled to immunity as set forth in *Westfall*. *Westfall* requires both that the

official have been engaged in discretionary duties and that the official have been acting within the scope of his authority in order to be entitled to immunity. The decision of the Eleventh Circuit further ignores the conclusion of the District Court that a fact issue exists with regard to the scope of employment issue.

The District Court was correct in ruling that a factual question exists as to whether the Respondent was acting within the scope of his authority in sending the defamatory report at issue over the wire. In order to determine this factual issue, the trier of fact must first examine whether DeMenna was authorized to make such a report by the handbook setting forth the guidelines for his job. In this regard, the Eleventh Circuit makes both a factual and a legal assertion, neither of which are supported by the record. Specifically, the record does not contain or support the factual assertion of the Eleventh Circuit that Respondent "is a major producer of Vidalia onions in the region." More importantly, the record does not contain or support the alleged factual and legal conclusion of the Eleventh Circuit that "a police raid on a major supplier of Vidalia onions for mislabeling is an 'unusual occurrence' and one which could affect market prices." The only assertions in the record which in any way relate to these statements in the Court's opinion are unsupported allegations in briefs and unsworn statements in an alleged affidavit. Such unsworn and unsupported statements are inadmissible evidence in the record on a summary judgment motion. Both of the above-quoted statements from the opinion of the Court of Appeals amount to factual determinations which must be left for decision by the trier of fact in reaching its ultimate decision on

whether DeMenna was acting within the scope of his authority.

The trier of fact in this case must determine whether a police raid on a farmer, who is not necessarily a "major producer," was an "unusual occurrence," in order to determine whether DeMenna was within the scope of his authority in reporting on the raid. If the jury should determine that the police raid was not an "unusual occurrence," Defendant DeMenna was not acting within the scope of his authority and should not be entitled to immunity under *Westfall.*

In making the determination of whether the police raid here involved amounted to an "unusual occurrence," the jury must consider Demenna's admission that he had never previously reported on a criminal investigation or a police raid and that he was never instructed to report on any criminal investigations or police raids. The jury must further consider whether a raid on a single producer of a particular agricultural product, who was not shown to be a "major producer," amounts to an "unusual occurrence" to be reported in a publication such as the Market News which is concerned with occurrences affecting an entire industry. In any event, an *unsworn* statement of a conclusory allegation that the raid was an "unusual occurrence" such as that submitted by Respondent herein is absolutely insufficient to support summary judgment on this issue.

Even assuming for the sake of argument that the issue of whether DeMenna's report concerned an "unusual occurrence" is not properly left for jury determination, a jury issue is nonetheless presented as to whether DeMenna was acting within the scope of his

authority in reporting alleged criminal allegations which were completely false without undertaking reasonable care to verify the allegations prior to issuing his report over the wire. In this regard, it is important to note that DeMenna admitted that he never attempted to confirm the alleged facts of the news release with Petitioner Scott or his agent, Dennis Seal, (R1-22, 42), nor did DeMenna attempt to confirm the facts with the GBI or any other law enforcement agency, (R1-22, 42). Moreover, Respondent DeMenna admitted that the information provided to him concerning the GBI raid on Petitioner Scott's packing shed was provided to him by individuals who were not his regular contacts in the Vidalia onion market (R1-22,35). Clearly, a jury issue exists as to whether DeMenna was acting within the scope of his employment in reporting false and defamatory facts which he failed to exercise reasonable care to verify.

The Eleventh Circuit has itself recognized in other decisions that the question of scope of employment is a jury issue which is not properly decided on summary judgment. In *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), the court held that whether or not a prosecutor's statements at a press conference concerning defendant's indictment by a grand jury exceeded the scope of his authority was a disputed issue of material fact precluding summary judgment on the basis of absolute immunity. The court examined 28 C.F.R. Section 50.2 (1981) and stated that if defendant spoke only what he was permitted to say by regulation, he would be entitled to absolute immunity under *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1950). However, if his comments were outside the authority of the regulations, he would not

be entitled to immunity. Petitioners in the instant case have shown that nowhere in the Market News handbook or the branch notices is there any authority specifically directing DeMenna to report on police raids. Accordingly, a fact issue exists as to whether DeMenna was acting within the scope of his authority.

Further, in *Watkins v. United States*, 462 F. Supp. 980 (S.D. Ga. 1977), the District Court applied Georgia law and held that whether or not an action was done in the scope of a federal employee's employment was an issue for the trier of fact except in "plain and indisputable" cases. The instant case is not a "plain and indisputable case" in light of the factual issues set forth above. The Eleventh Circuit's grant of immunity to the Respondent as a matter of law is therefore improper.

CONCLUSION

The issue of whether DeMenna was performing discretionary duties is not determinative as implied in the opinion of the Eleventh Circuit. The *Westfall* decision requires both that the Defendant be performing discretionary duties and that he be acting within the scope of his employment in order to receive the protection of immunity. Where an issue of fact exists as to whether a government employee was acting within the scope of his authority, summary judgment cannot be granted on the basis of a claim of immunity.

WHEREFORE, Petitioners respectfully request that their Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

RAYMOND O'NEIL SCOTT and SCOTT FARMS, INC.,

v.

RICHARD DEMENNA,

No. 87-8405

United States Court of Appeals,
Eleventh Circuit.

March 14, 1988.

Producer of vidalia onions in south Georgia brought defamation suit against market news reporter for the Department of Agriculture. The claim arose from the defendant's report of a police raid on the plaintiff's business, based on suspicion that plaintiff was mislabeling onions. The United States District Court for the Middle District of Georgia, No. CA85-47-THOM, J. Robert Elliott, J., denied defendant's motion for summary judgment based on immunity from common-law tort liability, and defendant appealed. The Court of Appeals, Hatchett, Circuit Judge, held that defendant was entitled to federal official immunity from defamation claim because his duties as market news reporter required inherent discretion in reporting events that might affect agricultural markets in Georgia.

Reversed.

Appeal from the United States District Court for the Middle District of Georgia.

Before HATCHETT and CLARK, Circuit Judges, and LYNNE*, Senior District Judge.

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

HATCHETT, Circuit Judge:

In this defamation lawsuit removed to federal court, we apply the Supreme Court's recent decision in *Westfall v. Erwin*, ___ U.S. ___, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988) to reverse the district court's denial of a federal official's motion for summary judgment based on immunity from common law tort liability.

The Department of Agriculture (Department) employs the appellant, Richard DeMenna, as a market news reporter. The Department also publishes the "Fruit and Vegetable News," which reports prices and matters affecting the prices of fruits and vegetables. Although DeMenna primarily reports routine information that affects the prices of fruits and vegetables, he is also required to report "unusual occurrences" that could affect market prices in Georgia.

The controversy in this case arises from DeMenna's news release, published in the "Fruit and Vegetable News," concerning a police raid on Scott Farms, Inc., owned by the appellee, Raymond O'Neil Scott. The news release stated that law enforcement officers suspected Scott of transporting out-of-state onions and mislabeling them as Georgia "vidalia" onions. The vidalia onion is world renown, has a sweet taste, is indigenous to the South Georgia region, and brings a higher price than most other onions. Scott is a major producer of vidalia onions in the region. The news release which was circulated nationwide noted that a grand jury previously indicted Scott in a similar case.

Scott filed a defamation lawsuit in state court alleging injury to his business as a result of the news release. After DeMenna removed the lawsuit to federal court, he moved for summary judgment contending that a federal employee acting within the scope of employment is immune from common law tort liability. The district court denied the motion for summary judgment.

On appeal, DeMenna contends that the district court erred in ruling that a genuine factual dispute exists as to whether DeMenna acted within the scope of employment. The sole issue for resolution is whether DeMenna's motion for summary judgment should have been granted.

The Supreme Court recently settled the test of absolute immunity for federal officials. In *Westfall v. Erwin*, ___ U.S. , 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), *aff'g*, 785 F.2d 1551 (11th Cir.1986), the Court affirmed this circuit's decision and held that conduct of federal officials must be discretionary in nature and within the scope of employment before the official's conduct is absolutely immune from state tort liability. *Westfall*, ___ U.S. at ___, 108 S.Ct. at 584-85. The Court in *Westfall* recognized that the purpose of official immunity would be defeated by shielding a federal official from state tort liability in situations where the official does not exercise independent judgment. Indeed, non-discretionary activity has no support from the traditional justification for official immunity. The discretionary nature of a particular act is central to the question of whether an official should be afforded absolute immunity. *Westfall*, at ___, 108 S.Ct. at 584-85; *see generally Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) (where the discretionary nature of the act was dispositive to Justice Harlan's opinion).

In this case, DeMenna's job responsibilities required discretion in reporting the market news. DeMenna's responsibilities required that he report "unusual occurrences" that could affect market prices in Georgia. The market news handbook does not codify "unusual occurrences." A police raid on a major supplier of vidalia onions for mislabeling is an unusual occurrence and one which could affect market prices.

Although this court has precedent in accordance with the *Westfall* decision, prior to the *Westfall* decision controversy existed among the circuits as to the proper test

to be applied in immunity cases.** The district court, in making its decision concerning the immunity question, did not have the benefit of the recent Supreme Court decision in *Westfall*. Consequently, because DeMenna's duties as market news reporter requires inherent discretion in reporting events that may affect the market, and because no genuine issue of fact remained as to whether DeMenna acted within the scope of employment, summary judgement on the immunity issue should have been granted.

Accordingly, the decision of the district court is reversed.

REVERSED.

** *Compare General Electric Co. v. United States*, 813 F.2d 1273, 1276-77 (4th Cir.1987) (where federal officials were held to be absolutely immune from state law tort suits for conduct within the scope of their employment) with *Araujo v. Welch*, 742 F.2d 802, 804 (3rd Cir.1984) (a federal official's conduct absolutely immune only if within the scope of employment and discretionary). The *Barr v. Matteo* opinion contained language that led some circuits to believe that when an official acts within the scope of his employment he is automatically immune from suit. On the contrary, the discretionary function was central to the Court's decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 86-47-THOM

RAYMOND O'NEIL SCOTT and SCOTT FARMS, INC.,
Plaintiffs,

vs.

RICHARD DEMENNA, BLAND FARMS,
DELBERT BLANK, and JOHN DOE,
Defendants.

Filed at 10:00 a.m.
May 11, 1987

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In the case above identified the Defendant Richard DeMenna has filed a motion for summary judgment and briefs in support of the motion. The Plaintiffs have filed briefs in opposition to the motion. Upon consideration, the Court determines that it cannot be said with assurance that there is not controversy concerning facts material to a resolution of this matter and that it would therefore be improper to sustain the Defendant's motion. Accordingly, the motion is denied.

IT IS SO ORDERED this 8th day of May, 1987.

/s/ ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8405

RAYMOND O'NEIL SCOTT and SCOTT FARMS, INC.,
Plaintiffs-Appellees,

v.

RICHARD DEMENNA,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion March 14, 11 Cir., 1988, ___ F.2d ___).
(April 22, 1988)

Before HATCHETT and CLARK, Circuit Judges, and LYNNE*, Senior Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

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* Honorable Syebourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Bac are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing IN Banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett
United States Circuit Judge